IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/08/2002

CORAM

THE HON'BLE MR. JUSTICE K. SAMPATH

S.A.No.1966 of 1989
and
C.M.P.Nos.1493 to 1496 of 1997

1. Subadhra Palayam
2. Minor Krishnapal
3. Minor Kripal

(Minor appellants 2 and 3
represented by their mother,
next friend and guardian
1st appellant) – All residing
at Y-181, Plot No.4594,
Anna Nagar, Madras – 40. ... Appellants

-Vs-

1. Amirthammal (Deceased)
2. Dr.K. Kapali
3. K. Sahadevan
4. K. Radha Bai

(Respondents 2 to 4 recorded
as L.Rs. of deceased 1st
respondent as per order of
the Deputy Registrar dated
4-2-1997) ... Respondents

!For Appellants: ... Mr.R. Subramanian

^For Respondents: ... Miss.M.B. Dominique
for Mr.V. Manohar

This second appeal is filed against the judgment and decree
dated 1 7-2-1988 made in A.S.No.246/86 on the file of the II Additional City
Civil Judge, Madras.

:JUDGMENT

Defendants 3, 5 and 6 in O.S. No.9428/81 on the file of the XIV Assistant City Civil Judge, Madras, are the appellants in the second appeal. They are respectively the widow and children of one Palayam. Palayam's mother was one Amirthammal, the first respondent herein, and his brothers and sister are respondents 2 to 4. The first respondent died pending the second appeal and respondents 2 to 4 have been recorded as legal representatives of the deceased first respondent on the basis of the memo filed by respondents 2 to 4.

2. The suit was filed by the deceased first respondent for partition and separate possession of her 1/12th share in the plaint A and B Schedule properties and 1/4th share in plaint C Schedule and also for marriage provision for the 4th respondent. The first appellant was the third defendant, respondents 2 and 3 were defendants 1 and 2, the 4th respondent was defendant No.4 and appellants 2 and 3 were defendants 5 and 6.
3. Her case was as follows:

She was the mother of respondents 2 to 4 and one Palayam. Palayam was the head and manager of the Hindu Joint Family consisting of himself and respondents 2 and 3. Plot No.4594 in Anna Nagar was purchased in his name for the benefit of the joint family with the help of joint earnings and contributions of Palayam and his two brothers, respondents 2 and 3 herein and a two storeyed house was also constructed out of the joint earnings and contributions. The joint family assets were also deposited as jewels and cash in banks as set out in Schedule B. The properties were always considered and treated as joint family properties. Palayam died on 30-3-1981. The first respondent and the appellants were his heirs. As per Hindu Succession Act and the principles of Hindu Law, Palayam was entitled to 1/3rd share in the properties mentioned in plaint Schedules A and B and the said 1/3rd share devolved on his death on the first respondent and the appellants in equal shares. The first respondent became entitled to 1/12th share in plaint Schedules A and B. Schedule C items were the personal funds of Palayam and on his death the first respondent became entitled to 1/4th share in those items. The properties not having been divided by metes and bounds, the suit came to be filed for partition and separate possession of first respondent's 1/1 2th share in plaint A and B Schedule properties and 1/4th share in plaint C Schedule. The sons and daughter, respondents 2 to 4 (defendants 1, 2 and 4) supported the plaint averments.

4. The appellants filed a written statement contending inter alia as follows:
Plaint A Schedule land was purchased by Palayam with his own separate earnings and the house was also constructed with his own separate money. There was no joint family nor was there any joint family property yielding any income, so as to enable the acquisition of any joint family property. On the death of Palayam, plaint A and B Schedule properties devolved on the appellants and the first respondent in equal shares, each getting 1/4th share. Defendants 1, 2 and 4 were not entitled to any share in the properties. As regards C Schedule items, they were the absolute properties of Palayam. There was no need to make any provision for the marriage of the 4th defendant because there was no joint family property or

income therefrom. The suit was also barred by limitation. It had not been properly valued for the purpose of Court fee and jurisdiction.
5. On the above pleadings, the trial Court framed the necessary issues. On the side of the plaintiff, Exs.A-1 to A-8 were marked and the plaintiff examined herself as P.W.1. On the side of defendants 1, 2 and 4, the second defendant was examined as D.W.1 and the 3rd defendant was examined as D.W.2 and one Dhakshinamurthy was examined as D.W.3.

6. On the basis of the materials on record, the trial Court passed a preliminary decree for partition and separate possession of the plaintiff's 1/12th share in the properties in plaint Schedules A and B and 1/4th share in C Schedule items. The appellants herein filed appeal in A.S.No.246/86. Before the Appellate Court, two civil miscellaneous petitions were filed for receiving additional evidence, C.M.P.No.2172/86 and C.M.p.No.65/87. Out of 9 documents sought to be received as additional evidence in C.M.P.No.2172/86, 7 were received as additional evidence. In the other civil miscellaneous petition 2 documents were sought to be produced and both were received in evidence and the documents were marked as Exs.B-32 to B-40.
7. The learned Appellate Judge by judgment and decree dated 17-2-19 88, modified the decree of the trial Court, allowed the appeal in part granting a preliminary decree for partition and separate possession of the plaintiff's 1/12th share in plaint a Schedule property, 1/4 th share in items 1 to 6 and 8 in plaint B Schedule and 1/4the share in plaint C Schedule. The plaintiff's claim over item 7 of plaint B Schedule was negatived. Similarly, the claim of defendants 1 and 2 over the items in plaint B Schedule was also negatived.

8. It is as against that, the present second appeal has been filed. At the time of admission, the following substantial question of law was framed for decision in the second appeal:

"Whether the Court below after having found clearly that respondents 2, 3 and 4 had no title to the land, has not committed error apparent on the face of record in granting a decree including the land also?"

9. Mr.R. Subramanian, learned Counsel for the appellants, submitted as follows:
When even according to the learned Appellate Court there was no joint family nucleus and there was no joint family income to enable the family to acquire any property with the help of the said income, it was in error in holding that Palayam's brothers, viz. defendants 1 and 2 were entitled to 1/3rd share in plaint A Schedule property; by the same reasoning as for B Schedule property, the lower Appellate court ought to have rejected the claim of defendants 1 and 2 for plaint A Schedule property. The lower Appellate Court found that the evidence of P.W.1 and D.W.1 was very much interested and still held that they were entitled to a share in the A Schedule property. The lower Appellate Court having found that Palayam alone must have contributed for the entire cost of the plot, went wrong in holding that the defendants were entitled to 1/3rd share each in the absence of any plea. The lower Appellate Court also found that the construction of the ground floor was

over by 1971 and both defendants 1 and 2 could not have contributed anything for the first floor, particularly when they had not got a job and the first defendant became a Doctor only in 1973. There was also ample evidence to show that Palayam had raised loan from his employer and also from out of his other earnings, he had put up the first floor also. The lower Appellate Court failed to draw the necessary inference from the declaration made by defendants 1 and 2 that they were not joint family members. Those are applications made by them to the statutory authority and the contents of the applications made by them to the effect that they had no joint family property ought to have been accepted and relief refused to them. The lower Appellate Court also made a serious mistake in thinking that the building in Plot No.4594 consisted of ground and two floors on a misinterpretation of the words "two storeyed". The learned Counsel took me through the relevant oral and the documentary evidence to substantiate his submissions.

10. Per contra, the learned Counsel for the contesting respondents, viz. respondents 2, 3 and 4, submitted that the lower Appellate court has, as a final Court of fact, found that the property was joint family property and the plaintiff and defendants 1 and 2 were also entitled to a share and sitting in second appeal, no interference was called for.

The learned Counsel also relied on the judgment of this Court in MANICKA GOUNDER AND ANOTHER VS. LAKSHMI AMMAL (2002(3) LW 281).

11. It is necessary to refer to the findings by the lower Appellate Court as to the nature of the property. In paragraph 17, the lower Appellate Court has found as follows:

"Therefore, we can safely proceed on the basis that there was no joint family nucleus and therefore there was no joint family income to enable the family to acquire any property with the help of the said income."

In paragraph 18, the learned Judge rejects the case of defendants 1 and 2 that they were earning at the time of the acquisition of the site and the construction of the superstructure, that they used to give their earnings to Palayam and he incurred the family expenses and utilised the funds for the construction also and that therefore, the said house was the result of the joint earnings and contributions of all the three brothers and it was always treated and considered as joint family property.

12. The learned Judge specifically held that the evidence of P.W.1 and D.W.1 was very much interested and the same could not be accepted without documentary corroboration. The learned Judge further found that the site was acquired by Palayam in 1968. At that time neither of his brothers

was employed. D.W.1, the first defendant, completed House Surgeoncy only in 1973 and if at all, he could have earned only after 1973 as a Medical Practitioner. Before 1973 the first defendant had no earnings of his own.

13. So far as the second defendant, who was examined as

D.W.1, is concerned, this is what the learned Judge finds:

"But, D.W.1 says that he was working as a Civil Engineer under a contractor from 1968 onwards, that he was getting Rs.300/- or Rs.400/- per month at that time and that in April, 1969 he joined in Government Service and he gave his salary to his brother Palayam every month. Except such interested testimony of D.W.1 and P.W.1. There is no other acceptable documentary proof or some other independent proof to indicate that D.W.1 also gave his salary to Palayam."

The learned Judge further finds that,

"Palayam was in service from 1948 onwards and he was earning in his own way. As indicated in Ex.B-14, more than Rs.8000/- was paid for the plot. D.W.1 is not able to say clearly as to how much money he contributed towards the purchase of the plot. In the absence of any such clinching proof and in the fact of acceptable evidence about the earnings of Palayam at that time, one can easily come to a conclusion that Palayam alone must have contributed the entire cost for acquiring the plot. Therefore, I hold that it has not been satisfactorily proved that D.W.1 also contributed for acquiring the plot in the name of Palayam."

14. So far so good. The learned Judge also finds that the ground floor construction was over by 1971. However, assuming that the building had more than two floors, viz. first and second floors, the learned Judge finds as folllows:

"After sometime it appears that the family shifted to the new house and after sometime, the other floors were also put up. By about 1976, the construction was completed. But, it is significant to note that at the time of the construction of the house in various stages, all the three brothers were in service and they were earning independently. The first defendant was working as an Engineer and he had his own salary. Second defendant was working as a Doctor and he had his own salary. The various pass books and letters, which were exchanged between the brothers, clearly indicate the drawal of the money from the banks for the said construction. From the letters, it is very clear that all the three brothers consulted each other regarding the construction of the house and other details."

15. The learned Judge also finds that there was evidence to indicate that Palayam obtained a loan of Rs.11,500/- from the Electricity Board for constructing the house and concludes that that amount alone would not have been sufficient to meet the expenses of the construction. According to the learned Judge, to complete the construction of the house with two storeys, it must have consumed considerable money. Unless all the three brothers had contributed, it would not have been possible for completing the construction. The approach of the learned Judge was clouded by the fact that there were more than two floors to the building. On their own showing, defendants 1 and 2 had not proved that they had contributed anything either for the purchase of the site or for the construction of the building. The ground floor construction was completed in 1971. There was only one more

floor to be constructed and Palayam admittedly borrowed Rs.11,500/- for completing the construction. There is absolutely no iota of evidence to show that defendants 1 and 2 contributed anything for the construction of the first floor of the house.

16. The learned Counsel for the appellants took me through the various documents produced in the case, which had not been adverted to at all by the lower Appellate Court as the final Court of fact. It was its duty to have gone into the oral and the documentary evidence and entered a finding. The learned Counsel for the respondents submitted that as the final Court of fact, the lower Appellate Court had given a finding and it was not necessary when it was one of concurrence to advert to each and every document and give its views.

17. There are very many striking materials in the shape of documents in the instant case, which ought not to have been ignored by the lower Appellate Court as the final Court of fact. Palayam was 50 years old when he got married. It is evident that he joined service in 194 8, when he was barely 18. The first defendant finished his House Surgeoncy in 1973. The second defendant finished his Egnineering in 196 8. They had not contributed anything for the site and for the construction of the ground floor. We have to examine whether they could have contributed anything for the construction of first floor. Ex.B-4 is the Savings Bank Passbook extract of Palayam. The various transactions during the lifetime of Palayam find their place in the passbook. Ex.B-6 is the Savings Bank Passbook of Palayam in National Grindlays Bank Ltd. Ex.B-8 is the copy of the letter dated 27-7-1974 addressed to the first defendant by Palayam. The letter runs as follows:

"Brother with some money and stool went to see your room mate with the idea of handing over them. But after thorough search in the Railway Station the Dentist was not there; neither he paid a visit to our house. He might have cancelled his trip and may come there on 28-7-1 974, I presume. Regarding transistor-cum-tape recorder, I was informed that Rs.1,800/- can be paid if it contains record player also. Otherwise the price may be Rs.1400/- only. I have applied for a part additional withdrawal from my G.P.F. Account for Rs.1000/- yesterday. I may be able to get the money within a fortnight. Regarding your transfer nothing is happening. Anyhow one of the Superintendents in D.H.S. Office promised to post you at least to a suburban place since there is vacancy now in E.S.I. Only. If you require I will send the table and stool by rail. Write about your views. Sahadevan is on leave up to 27-7-1974 and is due to duty on Monday, the 29th instant. I think he will rejoin when his fate will be known. Let us finish electric installation and bath room, latrine and partition wall work first. I will also try to get timber from some company on account basis through Mr. Balaraman, Contractor. Lakshmi Chinnamma came to our house on day before yesterday as a courtesy visit. We have also not received back that Rs.200/- taken from us. I will send some money on Monday either cheque or demand draft in your favour. If you desire, you may start a clinic. In the meantime I will try to post you to Madras or suburb somehow or other. There was some shower today in the early morning in our area. While occupying the room for clinic try to pay minimum advance that when we vacate there will not be botheration for refund. Take

care of your health. Have you sent the scooter application through proper channel to the Secretary, Home Department, Madras-9. Do it if not sent already."

18. From the contents of the above letter, it could be seen that the first defendant wanted to start a clinic, that Palayam would send some money either by cheque or demand draft in his favour on the following Monday and he had applied for a part additional withdrawal from his GPF Account for Rs.1000/-. Merely because he had mentioned about the progress in the construction, it would not mean that the first defendant or the second defendant had contributed any moneys for the construction of the first floor. On the contrary, he was sending money to his brother, the first defendant to meet the expenses for starting a clinic. Except for Ex.B-11 dated 6.8.1974, which is the counterfoil for taking a draft in Thanjavur Permanent Bank Ltd., Kadayanallur, for Rs.500/-, there is no other payment by the first defendant to Palayam. We cannot assume that this amount was sent for the purpose of construction of the first floor. It has already been noticed that even on 27-7-1974 Palayam had planned to send some money to the first defendant. Possibly this amount was by way of return of the money sent by Palayam to the first defendant.

19. Ex.B-16 is the lease-cum-sale agreement dated 5-6-1969 between Palayam and the Madras State Housing Board. Ex.B-19 is the application form to the Madras State Housing Board made by Palayam on 16-8-196 8 for allotment of a site. The allotment as already noticed, was made in his name and the Courts below had also accepted that the site belonged to him absolutely and there was no contribution by either of the brothers for the site. Ex.B-25 is the copy of the letter dated 16 -5-1969 from Palayam to the second defendant, who was then serving as Junior Engineer, Ramnad Sub Division at Thenkasi advising his brother "to take good milk and fruits, which might be cheaper in good quantity so as to subside heat and maintain good health." He had also advised him to submit his travelling allowance bill from Madras to Kadayam by bus with the help of the other Junior Engineer, who was also there. He was hoping that some day or the other, the brother would go to Madras definitely.

20. Ex.B-26 is the true copy of the application made by the first defendant to the Housing Board for allotment of a site. In column 8(f) he had stated that he was not a member of a Joint Family. In column 12 he had said that he did not own a house in Municipal Corporation etc. In column 13 he said that he had not owned any flat jointly, with his wife, father, child, etc. In column 14 also he had said that he did not apply for allotment of a site or site with building or flat in any of the Scheme areas of the former C.I.T. Or Madras Housing Unit or the Tamil Nadu Housing Board. Ex.B-32 is the corresponding application by the second defendant and in that he had said in column 7(f) to the query whether he was a member of joint family, he said " Yes. Mother, sister (unmarried), 2 brothers living separately."

21. The learned Judge in paragraph 21 explaining the applications made by defendants 1, 2 and 4 strangely says as follows:

"it is clear that all these members did not think at the relevant time that they constituted a Hindu Joint Family and that they were members of a Hindu Joint Family. That was why they stated in their respective applications that they were not members of any joint family. But, in this case, so far as plaint Schedule A house was concerned, though there was ample evidence to indicate that Palayam alone must have contributed for the purchase of the plot, there was acceptable and satisfactory evidence that that all the three brothers must have contributed for the construction of the house."

Absolutely no material has been produced substantiating the case of defendants 1 and 2 that they contributed anything for the construction of the first floor of the house.

22. The plaintiff, who was examined as P.W.1 put forward a queer stand that the fourth defendant worked as Tamil Pandit from the age of 13 and she contributed for the construction. This is only to be stated to be rejected.

23. The reason for the suit is not far to seek. The marriage between Palayam and the third defendant took place on 11-9-1980. Unfortunately, within six months of the marriage on 13-3-1981 Palayam died and defendants 5 and 6/ twins were born to the third defendant on 13-7-1981. Apparently, the brothers, the mother and the sister ganged up against the third defendant and wanted to deprive her of her legitimate share in the properties of Palayam.

24. In D.S. THIMMAPPA VS. SIDDARAMAKKA (AIR 1996 SC 1960) it has been held that if the first Appellate court fails to draw proper inference from proved facts and apply law in proper perspective, High Court is justified in drawing proper inference from such proved facts. It has been held in ROHINI PRASAD VS. KASTURCHAND (AIR 2000 SC 1283 = 2 000(3) SCC 668) that where there is misreading of evidence by the Courts leading to miscarriage of justice the High Court will be justified in interfering in second appeal.

25. In my considered view, this is a fit case where the powers under Section 100 of the Code of Civil Procedure have to be invoked for interference. It is clearly established that defendants 1 and 2 had not contributed even a pie for the construction of the first floor of the property and that absolutely no material has been produced by them showing that they contributed any money at any time by documentary evidence.
26. While dealing with B Schedule property, the learned Judge finds as follows:

"Under these circumstances, having regard to the ordinary course of human conduct,especially in respect of money matters, one would expect each brother to open an account in his own name and deposit the savings made by him. That alone would have been the normal conduct of each brother, if really they had an idea of saving something from out of their earnings. All these accounts were admittedly in the name of Palayam. They were opened by Palayam and they were operated by Palayam himself. If really the other brothers had saved

something from out of their earnings, they would have opened accounts in their own names in their respective places and operated the accounts themselves. The assertion that amounts were paid to Palayam, who, in turn deposited the same in his own name appears to be too tall to story to believe. At any rate, the burden of proving that these brothers handed over their moneys to Palayam and that those moneys were deposited in these accounts, is heavy on these persons. They have not stated in details how much money they handed over and in which bank such moneys were deposited by Palayam. Mere oral assertion in a sweeping manner will not in any way improve their case. In the absence of any acceptable and clinching evidence to indicate that defendants 1 and 2 paid some amounts to Palayam, who, in turn deposited the same in these accounts in his name, it is not possible to accept or uphold the contentions of the plaintiff and defendants 1 and 2 in this regard."

This reasoning is as much available for the A Schedule house also. The learned Judge was in error in holding that A Schedule property was joint family property in which defendants 1 and 2 also had a share.

27. One aspect which had been touched by the learned Judge should be also noticed. He had said that there is an inscription on the compound of the house giving the names of Palayam and defendants 1 and 2 and that the house is named as "Amirtha Nilayam" and according to the learned Judge this would show that it was a joint family property. What the learned Judge has omitted to note is that the life of Palayam has been one of sacrifice. He got into employment in 1948. There was no other source of income. The father was a matty in Madras Club and his income was next to nothing. For 20 years from 1948 to 1968 and more till 1973 he had earned; he had maintained the family; he had educated defendants 1 and 2 and also his sister, the 4th defendant and he had not married till 1980 till he was 50 years old and in 1974 he had perhaps no plans to get married and raise a family of his own. At that point of time it was possible that he entertained some idea that the property should be taken by all of them. But that was a mere act of generosity and that would not show that the property was treated as a joint family property, particularly when there was no joint family nucleus and there was no income. His generosity was sought to be taken advantage of by the brothers and for obvious reasons, they did not want his brother's widow and children to get the property belonging to their brother. They therefore set up their mother to file the suit. If the mother had taken a stand that it was the self-acquired property of Palayam, she would have been entitled to more share. Still she was made to say that it was joint family property. Defendants 1 and 2 themselves could not have filed the suit as they would have to explain the contents of their applications to the Housing Board stating that they did not belong to any joint family property and that they did not own any joint family property, etc. In MANICKA GOUNDER & ANOTHER VS. LAKSHMI AMMAL (2002(3) LW 281) relied on by the learned Counsel for the respondents, I have held that under certain circumstances, this court can interfere in second appeal. This decision does not support the case of the respondents at all.

28. From the above discussion, a further substantial question of law has to be framed as follows:

"Whether on its own showing that defendants 1 and 2 had not proved that they

had handed over their moneys to Palayam and that those moneys were deposited in Palayam's accounts, the lower Appellate Court was justified in finding that the brothers had contributed for the construction of the house?"

29. On the materials placed the conclusion is irresistible that the suit A Schedule property was the absolute property of Palayam in which defendants 1, 2 and 4 cannot claim any right whatsoever. The substantial questions of law are therefore answered in favour of the appellants.

30. The plaintiff as mother of Palayam would be entitled to 1/4th share and defendants 3, 5 and 6 would be each entitled to 1/4th share.
31. Now that the plaintiff is dead, though for purpose of carriage of proceedings, respondents 2 to 4 have been recorded as her legal representatives as the heirs of predeceased son Palayam, appellants/ defendants 3, 5 and 6 would also be entitled to a share in the share of the plaintiff. The plaintiff's share in the properties would be 1/4 and she has four heirs including Palayam and each would be entitled to 1/4 of her 1/4th share. So the appellants would be entitled to 1/1 6, besides what they are entitled to as heirs of Palayam.

32. The substantial question of law is answered in favour of the appellants. The second appeal succeeds. The judgment and the decree of the lower Appellate Court are modified to the extent indicated above. However, there is no order as to cost. The connected miscellaneous petitions C.M.P.Nos.1493 to 1496 are closed.

Index: Yes
Internet:Yes
IGP
K. SAMPATH, J.

Judgment
in
S.A.No.1966/89
and
C.M.P.Nos.1493 to 1496/97